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Nos. 669, 691, and 692

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 669

MUNICIPAL DISTRIBUTOR GROUP,
Petitioner

v.

FEDERAL POWER COMMISSION, *et al.*,
Respondents

No. 691

ASSOCIATED GAS DISTRIBUTORS,
Petitioners

v.

AUSTRAL OIL COMPANY, *et al.*,
Respondents

No. 692

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner

v.

AMERADA HESS CORPORATION, *et al.*,
Respondents

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS TEXACO INC., *ET AL.*, IN OPPOSITION

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BRIEF FOR RESPONDENTS TEXACO INC., *ET AL.*, IN OPPOSITION

Texaco Inc., *et al.* (Texaco et al.), respondents in Nos. 669, *et al.*, and conditional cross-petitioners in No. 681,

hereby submit their brief in opposition to the petitions filed in Nos. 669, 691, and 692 for writs of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 19, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals (Continental Appendix A, pp. 1-70) and its opinion on petitions for rehearing (Continental Appendix B, pp. 1-3) are not yet reported. The opinions and orders of the Federal Power Commission (Continental Appendices D, pp. 1-256, and E, pp. 1-112) are reported at 40 FPC 530 and 41 FPC 301. The opinion of the Hearing Examiner (III J.A. (I) 62d-447d) is reported at 40 FPC 703.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1970 (Continental Appendix C, p. 1) and was clarified by an opinion and order denying petitions for rehearing entered on June 16, 1970 (Continental Appendix B, pp. 1-3). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

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[1] Petitioners Continental Oil Company, *et al.* have filed in No. 680 Appendices to their Petition for Writ of Certiorari containing the complete text of opinions and judgment below, the agency opinions, and statutes involved. References herein to "Continental Appendix" are to that document. Petitioners Continental Oil Company, *et al.*, have also filed forty copies of the Joint Appendix in the Court of Appeals which consisted of four volumes designated as Part I and two volumes designated as Part II. A citation here to "III J.A. (I) 62d" therefore refers to Volume III of Part I, page 62d. Such page designations appear at the bottom of each page, and pages included in each of the volumes are shown in parentheses at bottom of the cover of each Volume of that Joint Appendix.

QUESTIONS PRESENTED

In light of the opinions and judgment below, Texaco *et al.*, deem all petitions for writs of certiorari in this case premature and questions raised thereby not yet ripe for review by this Court. Therefore, the questions actually raised by the petitions in Nos. 669, 691 and 692 are:

1. Whether the questions presented are ripe for review after the Court of Appeals affirmed decisions and orders of the Federal Power Commission under Section 19(b) of the Natural Gas Act, but, after a request for remand by the Commission, the court preserved all Commission powers to reconsider, rescind, or otherwise modify the decisions and orders, and the case is now pending before the Commission on motion seeking such reconsideration, rescission, and other modification?

2. Assuming *arguendo* the questions are not premature, whether after a Commission request for remand, the Court of Appeals, in the exercise of its equitable power on review under Section 19(b) of the Natural Gas Act, may affirm Commission decisions and orders but withhold finality and otherwise expressly preserve Commission authority to reconsider, rescind, or otherwise modify its decisions and orders if the Commission finds it in the public interest to do so?

3. Assuming *arguendo* the question raised in No. 692 as to Commission prescribed rates is not premature, whether substantial evidence and adequate findings support non-cost rate design adjustments made by the Commission to prescribe area rates under the method affirmed in the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968)?

STATUTE INVOLVED

Sections 4(a), 4(e), 5(a), 16, and 19(b) of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, are involved and are reproduced at Continental Appendix F, pp. 1-8.

STATEMENT

This brief is submitted in opposition to the petitions filed by the Municipal Distributor Group (MDG), the Associated Gas Distributors (AGD), and the Public Service Commission of New York (NYPSC). Those petitioners have set forth parts of the history of the case before the Commission and the Court of Appeals. In addition, in their Conditional Cross-Petition filed in No. 681, Texaco, *et al.*, have set forth a more complete, full statement of this case which is not here repeated, but to which reference respectfully is made. Those portions of that history which are most pertinent to the questions presented in Nos. 669, 691, and 692 are:

In its March 19, 1970 opinion, the Court of Appeals had found defect after defect in the Commission decisions. On the "most serious issue" involving Commission findings and legal standards—termed "the supply problem" by the court—the Court of Appeals recognized that this Court held in *Permian* that "adequate findings" would be required in the future, but noted that the Commission had left gaps similar to the omissions criticized by this Court in *Permian*. The Court of Appeals also specifically found ". . . the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way" (Continental Appendix A, pp. 49-50), and laid bare other defects in "findings" on related questions of supply, demand, and actual availability of capital to the industry at rates prescribed (Continental Appendix A, pp. 52-69). The court also noted existence of more current data then and now available to the Commission, including the study by the Commission's Staff released in October, 1969, indicating "perhaps a certainty, that the supply of gas is dangerously low" and "a serious shortage, in fact, may already be unavoidable" (Continental Appendix A, p. 52). The court also found that the assessment of the crucial facts as to supply, demand, and impact of prescribed rates called for by *Permian* had not been made in this case.

Therefore, it expressed "serious misgivings about affirming the Commission" and did so only with affirmative statements that the Commission still may "set aside the present order pending further determination" (Continental Appendix A, pp. 56-57); that "affirmance" is not a "judgment that the supply problem is not serious enough to require immediate modification of the order herein sustained" (Continental Appendix A, p. 59); that "the Commission must explain the relationship between the level of service, the demand for service, and the price it sets" (Continental Appendix A, p. 68); that the "mandate" of the Court should not "be interpreted to interfere with Commission action that would change the rates" (Continental Appendix A, p. 69); that, citing Section 16 of the Act and with emphasis supplied by the Court, the Commission had power to "rescind" its orders; and that dissolution of the court's stay would be without prejudice to Commission power "to stay its own order or to take any other appropriate action affecting this case" (Continental Appendix A, p. 70).

Thereafter, petitions for rehearing by these and some of the other parties raised *inter alia*, questions of whether an "affirmance" could leave the Commission with unimpaired powers to stay, vacate, modify or rescind its orders, as contemplated by the court. The court thereupon directed the Commission to respond to the petitions and to two specific questions concerning (1) Commission authority to stay, modify or rescind an order that has been "affirmed"; and (2) equitable powers of the court to "affirm" while preserving Commission powers "to stay, modify, or rescind" any order.[2]

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[2] The full text of the questions posed by the court is:

"(1) Whether the Federal Power Commission has authority to stay, modify or rescind an order once that order has been affirmed by this Court, if circumstances appearing since the entry of the order seem to make these actions advisable.

[Footnote continued on page 6]

In response, the Commission (1) took the position that it would not "have authority to permit any retroactive increases or decreases in a rate order, unless authorized to do so by a court": (2) stated that extent of the court's "equitable powers" had not been decided, and the court had "full statutory power to authorize or instruct the Commission" to "reconsider" the record or "reopen the record" for specific purposes "without necessarily reversing the Commission and vacating the order for a new hearing"; (3) noted the need for clarification of the Court's intent to authorize "retrospective adjustments" in light of its "use of the words 'sustained in full'"; and (4) requested a "remand" so "that the Commission can discharge its regulatory responsibilities consistent with the Court's opinion."

On the basis of the petitions, responses, and the Commission request for remand, on June 16, 1970, the court entered its order denying the petitions for rehearing, but also entered an opinion stating that "affirmance of the Commission's orders is structured so as to allow the Commission great flexibility" (Continental Appendix B, p. 1). The court stated:

> "We wish to make crystal clear the authority of the Commission in this case to reopen any part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments

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[2] [Continued]

"(2) Whether this Court may, in the exercise of its equitable powers, affirm an order of the Commission while preserving the authority of the Federal Power Commission to stay, modify or rescind the order if the circumstances seem to make these actions advisable."

in this case if it finds that it is in the public interest to do so.

"At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.

"In all *other* respects, the original opinion of this Court is the *final* disposition of this appeal." (Emphasis supplied)

On July 2, 1970, the Commission entered an order staying its own orders, effective upon dissolution of the court's stay. On July 14, 1970, the Court of Appeals issued its judgment as mandate, and the Commission stay thus is and remains in effect.

Texaco, *et al.* have filed with the Commission a motion seeking (1) reopening of the proceeding, (2) consolidation with the Commission's Docket No. AR69-1 in which more current data as to natural gas demand and supply and as to related industry capital requirements has already been presented, and (3) modification of the orders reviewed below in light of the record before the Commission in the reopened proceeding.

ARGUMENT

In the Court of Appeals, Texaco *et al.* sought express reversal of the Commission on a number of substantive

issues and a remand expressly directing the Commission to set aside its orders, to receive additional evidence, and to prescribe rates on the basis of current data as to supply deficiencies and industry capital requirements. The Court of Appeals declined to grant this relief. Instead, on the basis of pleadings which included the Commission's formal request for remand, the Court of Appeals effectively withheld finality of a judgment of affirmance by express terms in its June 16, 1970 opinion to permit the Commission to reconsider its opinions and orders.

This express action by the Court of Appeals now affords opportunity to all parties below—including Petitioners MDG, AGD, and NYPSC—to be heard fully before the Commission on all substantive issues involving continued validity of the orders reviewed below, current data pertinent to Commission reconsideration, and any retrospective or prospective modification found by the Commission to be in the public interest. All substantive questions in this multi-party, multi-sided case thus are left pending before the Commission by the opinions below, and that pendency and the terms of the Court of Appeals' opinion of June 16, 1970 thus render questions now presented by MDG, AGD, and NYPSC premature.

Texaco, *et al.*, therefore oppose the granting of the petitions in Nos. 669, 691, and 692, and further show that MDG, AGD, and NYPSC also are in error in their assertions that the disposition below, as clarified by the June 16, 1970 opinion, (1) rests upon misconstruction of Section 19(b) of the Natural Gas Act, (2) conflicts with decisions of this Court and of the Courts of Appeals, (3) may generally and adversely affect administration of the Natural Gas Act, or (4) precludes disposition of this case consistent with the Act's standards and the public interest.

Texaco, *et al.*, therefore submit that the petitions in Nos. 669, 691, and 692 should be denied.

I. Questions Presented by the Petitioners in Nos. 669, 691, and 692 Are Premature

Express reversal and formal remand with explicit directions to rescind the orders on review were fully supportable in this case and would have been consistent with the record and applicable precedent.[3] However, the Court of Appeals adopted a disposition which permits the Commission, in the first instance, to reconsider its opinions and orders fully, without any such express directives from the court, and to decide what further steps, if any, are warranted.

In light of this posture of the case, all questions involving claims of aggrievement, current facts as to present and future shortages of natural gas, availability of new evidence as to changes of capital requirements, and the relationships of these facts to the specific provisions of Commission's orders on review, are left for plenary consideration by the Commission. All parties—including those who are petitioners here—can be heard before any Commission reconsideration or change of its 1968 orders. The administrative body, under the mandate of the court below, then may reconsider its orders and decide upon retrospective or prospective "adjustments in this case if it finds that it is in the public interest to do so" (Continental Appendix B, p. 2).

Neither MDG, AGD, nor NYPSC may be aggrieved by such further Commission action. Significantly, none of these parties contends that in prescribing area rates the Commission should ignore current supply evidence and its relationship to price. The opinions of the Court of Appeals and actions by the Commission to date in this case correctly recognize existence of new evidence as to na-

[3] See Conditional Cross-Petition filed by Texaco, *et al.*, in No. 681. The position of Texaco, *et al.*, as there stated, is that if the remedy fashioned by the Court of Appeals is ineffective, then the court below erred in not reversing and remanding to permit the Commission consideration intended by the Court of Appeals.

tional and area gas supply emergent between the Commission decision on September 25, 1968 and the Court of Appeals' opinion of June 16, 1970 (see Appendices to Petition of The California Company in No. 682). In the view of the Court of Appeals and as indicated by the Commission's request for remand below, this new evidence of a gas shortage and related industry capital requirements in the late 1960's, and at present, is at least sufficient to require that the Commission should have opportunity to reconsider the 1968 orders on review in this case. As detailed at pages 10-13 in the Statement in the Conditional Cross-Petition of Texaco, *et al.*, the record, this Court's teachings in *Permian*, and the new evidence also clearly signal a situation so calling for prompt Commission reconsideration, particularly of the effect which implementing the 1968 orders would have upon exploration and development capability in the Southern Louisiana area.

The Court of Appeals correctly read these signals, but concluded that the Commission, rather than a reviewing court, was the appropriate body to formulate the remedial measures required. The court stated: "The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission" (Continental Appendix B, p. 2). The court, therefore, intended to leave no bar to Commission reassessment of its orders in light of today's supply situation and capital needs, and left all responsive steps for Commission decision in the first instance. Contrary to implications of the petitions in Nos. 669, 691, and 692, the Commission thus is left by the court with responsibility for deciding what modification, if any, is now warranted or may be found in the public interest. None is directed specifically by the court, and under the opinions below, agency findings as to what is acquired by the public interest remain a prerequisite to any new Commission action. The grant of the petitions in these cases, thereby further extending this prolonged litigation, will

frustrate and impede such prompt reconsideration required by the critical supply situation and sought by the agency itself.

Leaving aside the narrow, technical questions as to the basis for the court's disposition under Section 19 (b), discussed *infra*, the Court of Appeals' June 16, 1970 opinion is intended to leave the Commission the flexibility and capability—as sought by the Commission's request for remand—to reconsider its orders as fully as on an application for rehearing and to consider anew motions for reopening or for leave to adduce additional evidence. At this juncture, the results of Commission reconsideration and impact upon the various petitioners here necessarily are unknown. As the Court has been apprised, many of the parties are engaged in settlement negotiations, presided over by Commission counsel, with the expectation that the result will be acceptable to most, if not all, of the parties and acceptable to the Commission.[4] Absent that result, numerous other possibilities exist. In its reconsideration, the Commission may find no modification of its 1968 orders is warranted; or the Commission may find modifications in part only are justified; or as Texaco, *et al.*, believe, the Commission may find that presently known facts as to supply and capital requirements compel modifications that will be recognized as fully justified and in the public interest by most, if not all, of the parties cognizant of these facts. Regardless of present differences, future Commission action therefore can moot questions now presented.

Review at this juncture, particularly in light of the "aggrievement" requirements of Section 19(b) of the Act, thus is premature. The petitions in Nos. 669, 691, and 692, therefore, should be denied.

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[4] See Petition filed by The California Company in No. 682, pp. 12-14.

II. The Court of Appeals' Disposition under the Opinion of June 16, 1970 Was Within Its Authority under Section 19(b) of the Natural Gas Act

MDG, AGD, and NYPSC argue that the court's disposition is wholly beyond the court's authority under Section 19(b) of the Natural Gas Act (MDG Petition, pp. 19-22; AGD Petition, pp. 9-10; NYPSC Petition, pp. 17-20). However, because of the express terms of the opinion of June 16, 1970, this argument is without merit. While Texaco, *et al.*, submit that reversal and remand with express directions for rescission were and are more than warranted in this case,[5] the narrower, alternative, limited disposition on "equitable" grounds under terms of the June 16, 1970 opinion is not defective on the grounds of lack of power in a court to so limit effect of its own expressions of "affirmance" of a Commission order.

MDG, AGD, and NYPSC now argue as though there had been a final "affirmance" below without more, as though the opinion of March 19, 1970 stood as a final, unqualified "affirmance," and as though the express limits in the June 16, 1970 opinion had never been written.[6] Contrary to their arguments, however, the court did limit effect of its March 19, 1970 opinion and holdings by express terms in the June 16, 1970 opinion, clarifying its March 19, 1970 opinion and intentionally withholding any

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[5] See Conditional Cross-Petition of Texaco, *et al.* in No. 681.

[6] In this respect, the two questions stated by MDG, in particular, are not presented in this case (see MDG Petition, p. 1). MDG's first question is drawn as though the June 16, 1970 opinion, and express limits therein, had never been written by the Court of Appeals, and as though the court's holdings of June 16, 1970 rested upon a construction of Section 16 of the Act instead of Section 19(b) as expressly stated by the court. MDG's second question assumes the Court of Appeals held it has the power to fix rates "retroactively" and then has conferred this "equitable power" upon the Commission. However, there are no such holdings below. The Court of Appeals referred to its "equitable powers" as a reviewing court under Section 19(b), not to any purported judicial authority to "reverse" rates "retroactively" (*cf.* MDG Petition, p. 3).

effects of an unqualified "judgment" of "affirmance" that might have barred required, unrestricted Commission reconsideration.

This case, therefore, simply does not now present the questions as to agency or judicial powers of "rescission" under Section 16 of the Act, framed by MDG, or broadly drawn questions posed by MDG, by AGD, and by NYPSC as to general agency powers to rescind or otherwise modify an agency order which has been affirmed without such express qualifications or limitations. Section 19(b) empowers the Courts of Appeals to "affirm, modify, or set aside" a Commission order "in whole or in part," to order additional "evidence to be taken before the Commission . . . in such manner and upon such terms and conditions as to the court may seem proper"; and to enter stays of Commission orders. Significantly, in this instance, prior to entry of its June 16, 1970 opinion, the Court of Appeals had before it renewals of motions under Section 19(b) for leave to adduce additional evidence before the Commission, petitions urging that finality of an unqualified "affirmance" must be withheld, and *the Commission's* formal request for remand. Responsive to these pleadings, the Court of Appeals' opinion and orders expressly limited its "affirmance" and made provision for continuation of stay by the agency, with the results that finality of an "affirmance" without qualification did not attach, and Commission opportunity for reconsideration of the orders is preserved.

This Court has stated that authority of a Court of Appeals under a review statute similar to Section 19(b) does include "equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 373 (1939). In that instance, a remand for further proceed-

ings without reversal or setting aside of the agency order was sustained; and under similar readings, such remedies as "affirmance" coupled with express granting of motions for leave to adduce additional evidence also have been fashioned.[7] Where a reviewing court so *expressly* fashions a remedy and so *expressly* limits holdings, as in the June 16, 1970 opinion below, the ". . . great principles of equity should not yield to light inferences or doubtful construction." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946). See also *Arkadelphia Mill Co.* v. *St. Louis S. W. R. Co.*, 249 U.S. 134 (1919); *United States* v. *Morgan*, 307 U.S. 183, 197 (1938).

A compelling sequence of events below thus led to the court's opinion of June 16, 1970, and the expression of a remedy to afford the agency, after its formal request for remand, opportunity for reconsideration. The language in the June 16, 1970 opinion also harks back to a similar early reading of Section 19(b) of the Natural Gas Act in *Natural Gas Pipeline Co. of America* v. *Federal Power Commission*, 128 F.2d 481 (7th Cir. 1942), in which the principles of the *Ford Motor Company* case were applied:

> "In this respect the legislation is similar in its terms and purport to that governing orders of the Federal Trade Commission, the National Labor Relations Board, and various other administrative bodies. We have previously said in Century Metalcraft Corporation v. Federal Trade Commission, 7 Cir., 112 F.2d 443, that, under the Federal Trade Commission Act, 15 U.S.C.A. § 41 et seq., Congress has made a grant of original jurisdiction to the court to enforce, set aside or modify the Commission's order and that such power carries with it authority to vacate or modify our own judgment whenever good cause is shown.

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[7] See *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F.2d 49 (8th Cir. 1939); *Dolcin Corp.* v. *Federal Trade Commission*, 219 F.2d 742 (D.C. Cir. 1954), cert. den. 348 U.S. 981 (1955). See also *United States* v. *Brown*, 331 F.2d 362, 365 (10th Cir. 1964); *National Labor Relations Board* v. *Central Mercendita, Inc.*, 273 F.2d 370 (1st Cir. 1959).

> This is in accord with announcements of other jurisdictions. *We think it well settled that in respect to review of orders of Federal Boards and Commissions, the jurisdiction of the Circuit Court of Appeals, when granted by Congress, is original rather than appellate in character and that, being endowed with original jurisdiction, the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit.*" (128 F.2d at 484, emphasis supplied)

An "affirmance" without such limits, qualifications, or other express definition by the reviewing court therefore is not presented by virtue of the opinion of June 16, 1970 in this case. While Texaco, *et al.*, submit that reversal and express directives were and remain warranted, the narrower disposition below, leaving initial decision as to corrective action to the agency, was within the Court of Appeals' prerogatives under Section 19(b). Different results compelling specific corrective Commission action are sustainable in this case, but MDG, AGD, and NYPSC clearly err in asserting that the court was without any power to so fashion the minimal remedy explicitly stated in the June 16, 1970 opinion.

III. Disposition under the June 16, 1970 Opinion Does Not Present Conflicts with Decisions of This Court or the Courts of Appeals

MDG, AGD, and NYPSC also argue that the disposition below conflicts with holdings that (1) the Commission has no powers to award reparations, and (2) filed rates effective by final or "affirmed" Commission action may not be set aside subsequently or collaterally (MDG Petition, pp. 16-17, 20; AGD Petition: pp. 9-10; NYPSC Petition, pp. 16, 19). No such conflicts with decisions of this Court or of the Courts of Appeals are presented in light of the provisions of the June 16, 1970 opinion.

It is, of course, well settled that the Commission has no "reparations" powers, and that the "filed rate" principle applies under the Natural Gas Act.[8] It is also settled that agency orders that become final as a result of unqualified judicial affirmance, or otherwise by operation of law, generally are not subject to retroactive change or collateral modification.[9] In this case, however, no conflict with these constructions or principles results by virtue of the express terms of the June 16, 1970 opinion. As shown *supra*, the rates in issue have not become "final," and "reparations" or "retroactive" ratemaking thus are not involved.[10] Beyond this, the finality of an unqualified "affirmance" did not attach by virtue of timely petitions for rehearing, and the subsequent express terms of the court in the June 16, 1970 opinion.

For these reasons, the rates in issue in this case have never become "final" filed rates or otherwise made the "legal rate" by Commission action no longer subject to Commission reconsideration under Section 19(a) or judicial review under Section 19(b), in the sense these terms are used in cases cited by MDG, AGD, and NYPSC. Neither the holdings below, nor the effect of the opinions below, nor the ultimate result contemplated by the court below, therefore is, or can be now labelled as, in conflict

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[8] As to these constructions, MDG, AGD, and NYPSC correctly cite *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *State Corporation Commission of Kansas* v. *Federal Power Commission*, 215 F.2d 176 (8th Cir. 1954). See also *Arizona Grocery Co.* v. *Atchison, Topeka, & Santa Fe R. Co.*, 284 U.S. 370 (1932).

[9] As to these principles, MDG, AGD, and NYPSC correctly cite *International Union* v. *Eagle-Picher M. & S. Co.*, 325 U.S. 335 (1945); *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958).

[10] By the same token, "retroactive increases" *above* the rates heretofore charged, collected, and received for past periods also are *not* involved. *Cf.* MDG Petition, pp. 16-17.

with the "filed rate" and "finality" principles set forth in decisions of this Court and the Courts of Appeals.

Asserted "conflicts" claimed by MDG, AGD, and NYPSC therefore are not existent in light of the court's express terms, precluding the result now claimed by these petitioners. The appearance of "conflict" in holdings was thereby deliberately and intentionally removed by the court below in terms qualifying its affirmance, withholding finality, and otherwise precluding any operative effect of its judgment impairing Commission reconsideration of the opinions and orders on review.

IV. NYPSC Does Not Present a Substantial Question Involving Commission Prescription of Area Rates

NYPSC sets forth a question concerning alleged "cushions" boosting the "rate of return" (NYPSC Petition, pp. 3, pp. 20-21). With all deference to fanciful language of NYPSC, the question actually pertains to a portion of the Commission opinion involving rate design which was sustained below as fully supported by substantial evidence and required findings, and as consistent with the area rate methodology affirmed by this Court in *Permian*. The question, therefore, presents no issue involving conflict with opinions of this Court, of the Court of Appeals for the District of Columbia Circuit, or of any other court; and the question does not warrant review here on any ground asserted by NYPSC.

In *Permian*, this Court sustained Commission use of "non-cost" economic factors in prescribing "area rates," particularly if there were known imperfections or other recognized deficiencies in any "cost" data used. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 791, 815 (1968). These and other steps in the Commission methodology do not involve "cushions," "bonuses," or "boosts" of the "rate of return" despite NYPSC's colorful labelling. As correctly found below (Continental Appendix A, pp. 26-28, footnotes omitted):

"Even if we were to construe this case [the *Williams* case cited by NYPSC] as broadly disapproving noncost elements, the application to the sprawling, wildcatting gas producing industry of principles developed in regulating bus and telephone companies would require major adjustments. But this is not the extent of our disagreement with the argument advanced by these intervening parties. We do not understand the law of industry regulation, including the Williams case, to prohibit noncost elements that are based upon appropriate grounds. In *Permian*, the Supreme Court unequivocally stated that the FPC is not bound by the sum of cost and return even if it adopts costs as the primary basis of its calculations. The most persuasive reason for this rule is that cost pricing is circular. Past production has taken place at a given level; if a regulatory body fixes prospective prices at the cost of that production, it may be freezing the level of production, too. We think that the need for dramatically increased production from Southern Louisiana justifies the noncost factors added here, and that the FPC has power to include noncost elements that reflect its assessment of the need to use price as a tool to influence such economic relations. These are propositions that apply generally to regulation of utilities and quasi-utilities."

The court below also disposed of each of NYPSC's specific arguments by reference to the Commission's findings and the record. Repetition of the same arguments here does not present an issue differing from questions disposed of by *Permian* or now warranting another review by this Court. Review of these particular issues also would require a major re-examination by this Court of interrelated costing, rate design, and other rate of return issues decided by *Permian* [11]—an undertaking conflicting with

[11] See, *e.g.*, Questions Presented in Nos. 680, 682, 683, 684, and 685. If NYPSC's Petition were granted, petitions raising related cost, rate of return, and rate design issues also should be considered with NYPSC's question.

NYPSC's own urgings that expeditious disposition of this case is required.

V. Disposition under the Opinion of June 16, 1970 Permits a Result Consistent with the Public Interest and Commission Responsibility for Natural Gas Supply

MDG, AGD, and NYPSC argue, with differing language and emphasis, that Commission reconsideration under the Court of Appeals' opinion of June 16, 1970 necessarily is, or may produce results, contrary to the public interest and the Act's standards (MDG Petition, pp. 13-14, 20-22; AGD Petition, pp. 7-8; NYPSC Petition, 14-15, 17-20). This is not correct. Commission reconsideration and corrective action are urgently required; and in any event, the disposition below permits the responsible regulatory agency to consider the relevant facts now available and make the determinations, in the first instance, which now vitally affect current and future area and national gas supply.

Numerous documents presented below and in this Court emphasize facts reflecting a present shortage of natural gas.[12] A chain relationship is involved, requiring reference to demand, supply, exploratory efforts, capital required, and capital actually available under the Commission's 1968 orders. The court below correctly recognized that the Commission should be the body to reassess these relationships initially. The nature, size, cause, and cure for a supply shortage and for rising capital needs also were not decided by the court below. That court correctly recognized that the interests of all affected parties and the public interest will be best served if the Commission also is afforded the opportunity for reassessment of these facts before funds are paid over and passed on to AGD and MDG.

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[12] See *e.g.*, Appendices to Petition of The California Company in No. 682.

Most parties below agree and now urge this Court to permit that re-examination, even under the limited restrictions of the June 16, 1970 opinion, by denying the premature petitions for review here. It is clear that neither MDG, nor AGD, nor NYPSC can conclusively argue or show that rates or "refunds" based on findings concerning stale data, obsolete assumptions, and misconceptions of a plentiful supply are in "the public interest." The public interest in, and the Commission's responsibility for, an existent natural gas supply for consumers, as underscored in *Permian*, are inextricably intertwined, as recognized by the court below. As to the supply shortage and any related required modification of the 1968 orders, the court so declined to accept the *ipse dixit* of any of the parties as conclusive, but called for assessment by the administrative agency in the first instance. That assessment can be permitted, and is, in and of itself, a step that is in the public interest.

As to the relevant facts that now should control prescription of area rates, the court below also left these for further agency findings. Nevertheless, MDG, AGD, and NYPSC call for a pretense that economic conditions of 1956 or even 1960 now exist as to demand, supply, and capital requirements. Their arguments are presented without regard for the supply situation described by a unanimous Federal Power Commission as recently as September 18, 1970, in a decision in the *Hugoton-Anadarko Area Rate Proceeding*, FPC Docket No. AR64-1 (FPC Opinion No. 586, pp. 19-20, mimeo. ed.):

> "In determining area rates we have been charged by the Court of Appeals for the Fifth Circuit with predicting the probable demand for gas, determining the desired level of supply and attempting to determine a price which will elicit that level of supply. *Southern Louisiana Area Rate Cases, supra.* The court noted that this task was difficult, but said it must nevertheless be attempted by the Commission.

> "All major sources of energy in the United States are currently in short supply. Brown-outs have already occurred in some electric utility distribution areas. Restrictions on gas use have been imposed by distributors in a number of areas and are being considered in others. The stockpile reserves of coal for electric utilities are below the level considered by the industry to be a safe operating margin. The installation of nuclear power plants has progressed more slowly than was forecast and it now appears that nuclear power will not be able to ease the increasing demand on fossil fuel for many years. Domestic oil reserves are declining. Low-sulphur coal and oil are in short supply. Desulphurization facilities are lagging behind projected demand to meet stringent air pollution standards, destined to grow more stringent in several major urban areas. Pipelines are unable to obtain the desired supplies of natural gas. In 1968, according to the statistics of the AGA, the national findings of natural gas fell below production. This occurred again to a greater degree in 1969, when only about 8.3 trillion cubic feet were added to reserves while production mounted to 20.6 trillion."

In the present case, an area supplying up to one-third of the nation's natural gas supply is involved, and, as petitioners say, "huge sums" also are involved. The critical situation recognized below was that the public interest now calls for Commission reconsideration of the 1968 orders, and reassessment of any dissipation of funds detrimental to exploratory efforts and area and national natural gas supply. It will be only after Commission reconsideration and reassessment that any party can allege that the ultimate result is or is not in the public interest. That Commission reassessment should be permitted, rather than thwarted as sought by MDG, AGD, and NYPSC.

CONCLUSION

For the foregoing reasons, the petitions in Nos. 669, 691, and 692 should be denied; but if they are granted, then for reasons stated herein, the Conditional Cross-Petition filed by Texaco, *et al.*, in No. 681 also should be granted. Thereupon, Texaco, *et al.*, would urge that the Court summarily remand the case to the Commission with appropriate instructions to correct the errors of law set forth in the Questions Presented in No. 681. Such disposition will moot the Questions Presented in Nos. 669, 691, and 692.

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